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Thirty-third session

SUMMARY RECORD OF THE 690th MEETING

Held at Headquarters, New York,
on Wednesday, 21 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 10.10 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4; A/CN.9/XXXIII/CRP.6 and 7)

1. The CHAIRMAN invited the Commission to continue its consideration of possible exclusions from the draft Convention of assignments of receivables relating to an interest in land.

2. Ms. GAVRILESCU (Romania) said that, as submitted by the Working Group on International Contract Practices, the draft Convention was to have been general in scope, but provision had been made - in article 4(2) and article 39 - for States to enter reservations concerning specific practices. Her delegation had found that approach fully acceptable. During the Commission's consideration of the draft, however, the United States delegation had submitted a long and thoughtful list of exclusions, many of which her delegation had been able to support. At that point, the focus had changed: the Commission had adopted a new policy of compiling a complete list of exclusions, which would obviate the need for article 4(2) and article 39. The United States delegation had then suggested excluding real estate transactions from the scope of the draft Convention; again her delegation had felt able to support that concept. That had been followed by proposals from the delegations of Canada and the United Kingdom, the former of which had established a useful link between real estate and the State where such real estate was located. The only drawback to the two proposals was that the first had been presented in the context of article 24 and the second in the context of article 25, thus limiting their scope.

3. Her delegation could accept a new formulation which took account of the objections raised by the United States and Germany, or the adoption of the first part of the Canadian proposal, or a simple provision that any transaction should be governed by the law of the State in which the real estate was located, or the proposal submitted by the representative of France the previous day. Her delegation did not believe that it would be detrimental to the draft Convention to include special rules governing specific practices, but, if that ran contrary to the general view, her delegation would bow to the will of the majority. The options, then, were either to compile a complete list of exclusions, including real estate, under article 24 or to retain article 4(2) and article 39. In the latter case, the draft Convention would apply to real estate as to other areas. That would be welcomed by some delegations, including that of the United States, whereas others would be free to enter reservations.

4. The CHAIRMAN commended the flexibility shown by the Romanian delegation. He recalled, however, that it had been agreed to defer a final decision on article 4(2) to which many delegations were opposed, until the scope of the draft Convention had been determined.

5. Mr. SMITH (United States of America) proposed the following text for an exclusion relating to real estate.

6. In the case of a receivable secured by or arising from the sale or lease of an interest in real estate, nothing in this Convention (a) affects the rights of

a person entitled to priority in the receivable pursuant to the real estate law of the State in which the real estate is located or (b) authorizes an interest in the real estate that is not permitted under that law.

7. The aim of the proposal, which built on that submitted by the French delegation the previous day, was to underline two points of policy: first, if a person was, under real estate law, entitled to priority in connection with a receivable, the draft Convention would not affect that priority. Secondly, the draft Convention had no effect on national law concerning persons entitled to hold an interest in real estate. Where a receivable was secured by an interest in real estate, the mortgage on that property would serve as the security.

8. Mr. MORÁN BOVIO (Spain) welcomed both the flexibility displayed by the Romanian delegation and the United States proposal, which constituted a marked improvement on previous proposals. The Commission should adopt it without further ado.

9. Mr. TELL (France) said that his first reaction was uncertainty as to what precisely clause (a) aimed to exclude: he did not understand whether it was the receivable or the real estate that was affected by the priority. Moreover, France had no exact equivalent for "real estate law", which indeed differed in every country. Lastly, it seemed that the word "interest" would have different meanings in the chapeau and in clause (b).

10. Mr. MARADIAGA (Honduras) said that the previous speaker had pinpointed a real difficulty. The right to or interest in a receivable clearly did not involve an actual title to the real estate concerned, but that position should be stated more clearly. Subject to the necessary revision, his delegation would support the proposal.

11. Mr. Al-NASSER (Observer for Saudi Arabia) said that the United States position, as reflected in the proposal, was similar to that of Romania - namely that all receivables issuing from a real estate transaction were subject to the law of the State in which the real estate was located - except in respect of clause (b), from which it was unclear whether the interest that was authorized was subject to the law of the State in which the real estate was located. If it was, there was no need for clause (b), because the proposal contained nothing new. If, however, the proposal related to legislative decisions or to entitlement, further clarification was required from the United States delegation.

12. Mr. DOYLE (Observer for Ireland) said that the United States proposal largely met his delegation's concerns. With regard to the perceived ambiguities, he said that the word "interest" had a well-established meaning in Irish law, while "real estate law" was the equivalent of "land law" or the "law of real property". The Commission should decide whether it accepted the principle behind the proposal and leave the detailed wording to the drafting group.

13. Mr. SCHNEIDER (Germany) expressed general satisfaction with the proposal. He suggested, however, two changes that might solve some outstanding difficulties and at the same time broaden the scope of the provision. First, he

suggested that in clause (a) the words "real estate" should be deleted; it was sufficient to refer simply to the law of the State. Secondly, in clause (b), the phrase "that is not permitted under that law" should be replaced by the phrase "that interferes with that law." He also drew attention to a problem to which his delegation would revert during the consideration of article 19, paragraph 5. The law concerning priority was exceptionally complex; he himself had found it difficult to understand the subtleties involved. Yet every time that a debtor needed to find out whom he was to pay he would be forced to grapple with those complexities. The task for the assignee was much simpler.

14. The CHAIRMAN said that it was essential that the text should be comprehensible to those affected by it.

15. Ms. LADOVA (Observer for the Czech Republic) said that her delegation found the proposal acceptable, especially with the change suggested by the representative of Germany. For the time being, the words "real estate" could be placed between square brackets. With regard to clause (b), she favoured the insertion of the phrase "the acquisition of" before the words "an interest".

16. Mr. SMITH (United States of America) said that the aim of the proposal had been to establish the principle that the claims of people who had priority because of a claim on the real estate itself would not be interfered with. He was opposed to deleting the words "real estate" in clause (a) because that would provide an opening for a creditor to make a claim even if he had no interest in the real estate and might undermine article 24. He suggested that the phrase "law governing real estate" might be used. He stressed that the proposal did not concern conveyances of interest in real property but simply interest in the receivables, which were clearly subject to prior claims on the real estate itself and would have to comply with the law in the State in which the real estate was located.

17. Mr. TELL (France) said that he did not fully understand the intent of the United States proposal or to what legal situations it would apply. The proposal appeared to indicate that the draft Convention was without prejudice to the rules governing real estate, yet that point seemed obvious. He did not understand how the draft Convention could interfere with the rules concerning the determination of priority in cases where there were competing creditors. He asked what type of interest in real estate was envisaged in the proposal. Perhaps clause (a) was unnecessary.

18. Ms. GAVRILESCU (Romania) said that she associated herself with the comments made by the representative of France. Since the proposal was based on ideas put forward by the French delegation the preceding day, it should reflect the original wording of those ideas. She asked whether the proposal implied a connection between real estate and the law of the State in which the real estate was located; if so, the United States delegation should clarify that connection.

19. Mr. DESCHAMPS (Observer for Canada) said that the most common situation that would be covered by the proposal was probably one in which an assignor assigned a receivable secured by a mortgage on real estate, and the law of the State in which the real estate was located provided that priority between two assignees, in the case of assignments of receivables secured by real estate,

should be given to the assignee who had first registered the assignment. If neither assignee had registered the assignment, the provision proposed by the United States would not apply, since real estate law would not come into play and the priority would be determined by the law of the assignor's State. The aim of the proposal was to ensure that, in case of a conflict between the law of the assignor's State and the law of the State in which the real estate was located, the latter would prevail. In clause (a) of the United States proposal, the reference to real estate law should be retained, because an indication that priority should always be determined by the law of the State in which the real estate was located would completely disregard the law of the State of the assignor, whereas the law of the latter State determined priority except in the specific cases covered by the proposed provision. In clause (b) of the proposal, the phrase "authorizes an interest" should be changed to "authorizes the acquisition of an interest".

20. Mr. MORÁN BOVIO (Spain) said that he was satisfied with the United States delegation's explanation as to why clause (a) of its proposal should refer specifically to the real estate law of the State in which the real estate was located, since a reference to the "law" of that State in general could indeed make it possible for any creditor to claim priority and would depart completely from the rules for the determination of priority laid down in article 24, which was one of the pillars of the draft Convention. Under those rules, priority was determined according to the law of the State in which the assignor was located. Clause (a) of the United States proposal was intended not to change those rules, but to provide for a very specific exception; it was therefore necessary to keep that exception as narrow as possible by referring to "real estate law". However, clause (b) appeared to confirm an idea that was already clear from the text; namely, the general rule concerning the necessity of respecting national law. Clause (b) was therefore unnecessary.

21. Mr. DOYLE (Observer for Ireland) said he agreed that the reference to "real estate law" should be retained in clause (a) of the proposal and that the words "the acquisition of" should be inserted in clause (b), as proposed by the Canadian delegation. Both points should be retained, as both were useful.

22. Mr. FRANKEN (Germany) said that the term "real estate law" in clause (a) was too narrow. For example, in many countries, priority in cases of insolvency in connection with a receivable secured by a mortgage was determined not by real estate law, but by insolvency law. If clause (a) was retained, the reference to the law of the State in which the real estate was located must be broadened. He agreed with the French delegation that clause (a) seemed unnecessary, since it repeated the considerations on priority contained elsewhere in the draft Convention. Clause (b), if worded more broadly, would cover the points contained in clause (a) and would address the questions raised by the Canadian delegation. He proposed that the wording of clause (b) should be changed to read, "authorizes the acquisition of an interest in the real estate that interferes with the law of the State in which the real estate is located". That formulation would address the concerns of all delegations.

23. Ms. GAVRILESCU (Romania) said that if the Commission agreed that the provision contained in clause (a) of the United States proposal was necessary,

she would join the consensus. With respect to clause (b), she would prefer the change proposed by the Canadian delegation.

24. Ms. MANGKLATANAKUL (Thailand) said that she associated herself with the comments made by the German delegation with respect to real estate law. In Thailand, real estate law did not deal with questions of priority; those issues were covered under the civil and commercial code and insolvency law. Moreover, the United States proposal did not solve the problem of the competing rights of persons with an interest in land and persons with an interest in receivables connected with an interest in land.

25. Mr. SMITH (United States of America) said that the intention of his delegation's proposal was to establish a principle and that he was flexible with respect to the drafting of the proposed provision; for example, the drafting suggestions of the Canadian delegation were perfectly acceptable.

26. With respect to the question of whether clause (a) should refer to all the law of the State in which the real estate was located or only to the law governing the rights deriving from the real estate, it was necessary to consider, for example, the case in which an assignor of a receivable secured by an interest in real estate was located in a country whose priority rules differed from those of the country in which the real estate was located. If such an assignor assigned the receivable to more than one assignee, it was necessary to specify which country's law was recognized by the draft Convention as determining the priority to be accorded to those assignees. The draft Convention provided that, in general, the priority rules of the State in which the assignor was located should prevail. If clause (a) referred only to the law of the State in which the real estate was located, the priority rules of that State would apply even to cases in which no real estate-related creditor was claiming an interest in the real estate.

27. According to the original United States proposal, the draft Convention would look to the laws of the State in which the real estate was located only to protect persons having an interest in the real estate in that State and who, because of that interest, might also have an interest in the corresponding receivable. The problem in question was a very specific one. However, the law of the State in which the real estate was located should not be preferred merely because a receivable was associated with that real estate.

28. The proposed insertion, in clause (b), of the words "interferes with" could create uncertainty for those who extended credit against receivables secured by an interest in real estate. The current formulation was narrower and dealt with national laws that determined who could hold an interest in real estate.

29. With respect to the question raised by the representative of Thailand as to whether the draft Convention adequately dealt with the situation in which a person claiming an interest in real estate also claimed an interest in a receivable secured by such real estate in competition with the assignee of the receivable, the principle on which clause (a) of his delegation's proposal was based was that the draft Convention would provide no rule in that situation.

Instead, it specified that such conflicts were to be resolved not by the draft Convention, but by national laws.

The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.

30. Mr. TELL (France) said he did not understand what was meant by the word "interference". It was not a legal term, was not likely to be found in any United Nations international conventions and was not appropriate for inclusion in clause (a).

31. Mr. BURMAN (United States of America) said the consultations had indicated that the Commission was close to reaching a consensus. Many of the differences related to drafting rather than matters of policy. He recommended that the matter be referred to the drafting committee.

32. The CHAIRMAN suggested that the drafting committee would need some guidance, particularly as to whether the reference in clause (a) should be to the real estate law of the location of the land or to the entire law of that location.

33. Mr. SMITH (United States of America) said that there had never been any intention to refer to the entire law of the State where the real estate was located, but rather to those laws that would benefit someone holding an interest in the real estate, even if that interest did not arise under real estate law as such. If someone held an interest in the real estate, that person's right would be determined by all of the relevant protective legislation.

34. Mr. AKAM AKAM (Cameroon), referring to clause (a) of the American proposal, agreed that the Commission should give some guidance to the drafting committee. The first problem was the reference to real estate law. In his country, the priority issue was regulated not by real estate law but by specific texts that related to securities. Real estate law should therefore not be specifically mentioned in the draft text. It would have been logical to follow the law of the State of the assignor. If the Commission preferred the law of the State where the real estate was located, specific mention should be made of the national legislation dealing with issues of priority rather than to the law in general.

35. Mr. Al-NASSER (Observer for Saudi Arabia) said he preferred to include a reference to the law of the State in which the real estate was located, as otherwise there could be a conflict between the different national laws, including those dealing with property in general.

36. The CHAIRMAN said he took it that the Commission had reached a consensus on policy matters, and that it would now leave the wording to the drafting group.

37. Mr. DESCHAMPS (Observer for Canada) requested the drafting committee, when drafting clause (a), to take into consideration the second part of the written proposal submitted on the previous day by the delegations of Canada and the United Kingdom in order to resolve the difficulty relating to the reference to real estate law.

38. The CHAIRMAN invited the Commission to consider the proposal made by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT) contained in document A/CN.9/XXXIII/CRP.7.

39. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) pointed out that the word "incurred" in paragraph 2(x) should be changed to read "secured".

40. Mr. BURMAN (United States of America) said that the Commission had in the previous week heard presentations from UNIDROIT and also from representatives of the industries producing the three types of mobile equipment referred to in the definition proposed for inclusion in article 6 - aircraft (including airframes, aircraft engines and helicopters), railway rolling stock and space property. His delegation had been persuaded that those markets were indeed well-established. They were clearly demarcated from general commercial finance, to the extent that aircraft financing was distinct from general receivables financing. Some special treatment should be given to those industries, and the exclusion that they had requested seemed appropriate. The present draft Convention and the protocols and UNIDROIT draft Convention together might deal with priority when they came into force. If the present Convention was adopted without the adoption of the UNIDROIT draft Convention (which was not yet completed) there would be disruption in those important markets. An exclusion under article 4 therefore seemed an appropriate solution.

41. His delegation had some concern about the breadth of the language, but it seemed to accurately reflect the types of transactions that should be excluded. There were sales of mobile equipment that were financed by the seller, who retained the title until the price (the receivable) had been paid. In other cases, a third party financed the acquisition and was granted a security interest in the mobile equipment to secure payment of the purchase price. A third category related to rental payments that were considered as associated with the mobile equipment. A fourth category consisted of loans made to the owner of mobile equipment where the loan was secured primarily by that equipment. Any exclusion should be limited so that it could not be manipulated, for example by a general financier including an aircraft in the general financing of the operations of a borrower. The language presented seemed sufficient, but should be considered by the drafting committee.

42. Mr. TELL (France) said that there was no reason to limit the scope of application of the draft Convention by excluding transactions involving certain types of equipment. The UNIDROIT draft Convention on international interests in mobile equipment had not yet been adopted, nor had certain problems relating to that instrument's approach to assignments been resolved. He agreed with the representative of the United States of America that any exclusions should be as limited as possible; it was important to avoid creating gaps in the legal regime.

43. The criteria for applicability under the draft Convention were perfectly clear; those of the UNIDROIT draft Convention were less so. Article 3 (1) of the latter instrument stated that the Convention applied when the debtor was situated in a Contracting State, but there were also other application criteria which depended on the nature of the goods concerned. The exclusion proposed by

UNIDROIT would, of course, have the advantage of resolving questions of applicability in States not parties to the UNCITRAL Convention.

44. Furthermore, there had been no intergovernmental consultations on the terms "railway rolling stock" and "space property", and there was no legal definition of the latter term. The interests to which the United States representative had referred were those expressed by private groups and would not necessarily be endorsed by Governments in their discussion of the relevant draft protocols to the UNIDROIT instrument.

45. The clause in the UNIDROIT proposal referring to "assignments of receivables arising from transactions" was unclear, since assignments were in themselves transactions. The proposed text also mentioned "primary" real security but did not explain on what basis such primacy was to be established. Above all, the UNIDROIT draft Convention referred to the assignment of interests rather than of receivables and, in a mechanism contrary to most national legal systems, to the assignment of the right to payment; that fact could lead to problems where the two transactions involved different assignees.

46. The proposed amendment to article 6 was also problematic because, since the UNIDROIT draft Convention had not yet been adopted, the terms mentioned had no legal definition and judges of different countries might well disagree as to their meaning.

47. The CHAIRMAN noted that the current UNIDROIT proposal had been preceded by a proposal for a deference provision. The Commission needed to decide how to interface the two draft conventions.

48. Mr. ATWOOD (Australia) said that his delegation preferred the exclusion approach and was prepared to accept the UNIDROIT proposal subject to the drafting change read out by the Secretary of the Working Group and to the solving of the problem raised by the French delegation concerning the term "space property".

49. Ms. SABO (Observer for Canada) said that while her Government strongly supported the UNIDROIT draft Convention, she was opposed to the proposed amendment. Unlike the United States delegation, she did not think that special treatment should be accorded to the industries mentioned therein, and she agreed with the representative of France that the scope of the UNCITRAL draft Convention should be as broad as possible.

50. It had been argued that those industries had their own sophisticated, long-standing procedures which should not be disturbed and that the UNCITRAL draft Convention should defer to the UNIDROIT instrument in order to avoid potential conflicts. However, the proposed amendment would exclude all mobile equipment as defined therein, whether or not the State in question was a party to the UNIDROIT instrument; such a drastic approach was unnecessary. In any case, it was becoming increasingly unlikely that the Commission would complete its work on the draft Convention during its current session, in which case the matter could be settled once the UNIDROIT instrument had been finalized and adopted.

51. Lastly, if the Commission decided to provide for potential conflicts with the UNIDROIT draft Convention, it should do so under article 36 rather than article 4.

52. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that he considered the proposed exclusion an appropriate means of avoiding disruption in the way in which mobile equipment was financed. However, the term "primary real security" was unclear; the intent appeared to be to prevent transactions from being deliberately excluded from the scope of the draft Convention through the incorporation of a single piece of mobile equipment. Perhaps the word "real" should be deleted. Another problem lay in the meaning of the term "space property", which could cause problems if, for example, it was interpreted as including equipment located on the ground but used, inter alia, to track orbiting satellites. The problem might be referred to the drafting committee.

53. Mr. HERRMANN (Secretary of the Commission) said that since the main purpose of the proposal was to exclude special markets, it would be helpful for the Commission to receive information from delegations familiar with the industries in question. The drafting group could not be asked to settle substantive issues such as the potential for conflict with the UNIDROIT draft Convention.

The meeting rose at 1 p.m.